BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARILYN J. DeGIULIO, Claimant, v. DAWN ENTERPRISES, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants.	)	**IC 00-036636** **IC 01-007072** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed December 9, 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Robert D. Barclay, who conducted a hearing in Pocatello on May 5, 2004. Claimant was present in person and represented by Jonathan M. Volyn of Pocatello; Defendants were represented by Russell E. Webb of Idaho Falls. The parties presented oral and documentary evidence. This matter was then continued for the taking of five post-hearing depositions, the submission of briefs, and subsequently came under advisement on October 13, 2004.

BACKGROUND

This matter involves two claims for compensation. The first involves a November 15, 2000, motor vehicle accident (MVA) [IC 00-036636]; the second involves a February 22, 2001, slip and fall [IC 01-007072]. At Claimant's request, the two were consolidated for hearing by the Commission on June 19, 2003.

ISSUES

The noticed issues to be resolved as a result of the hearing are:

1. Whether Claimant suffered a personal injury arising out of and in the course of employment;

2. Whether Claimant's condition is due in whole or in part to a pre-existing injury or condition;

3. Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof;

4. Determination of Claimant's weekly wage;

5. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

6. Whether Claimant is entitled to permanent partial impairment (PPI) benefits, and the extent thereof;

7. Whether Claimant is entitled to permanent partial or permanent total disability (PPD/PTD) in excess of permanent impairment, and the extent thereof;

8. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate; and,

9. Whether Claimant is entitled to attorney's fees due to Employer/Surety's

unreasonable denial of compensation as provided for by Idaho Code § 72-804.

Defendants withdrew the noticed issue of whether Claimant's injury was the result of an accident arising out of and in the course of employment at hearing. (Transcript, p. 4). They concede the MVA and the slip and fall occurred, but dispute the extent of the injuries incurred.

ARGUMENTS OF THE PARTIES

Claimant argues she injured her neck in the November 15, 2000, MVA when her head hit the driver's side window, and again on February 22, 2001, when she slipped and fell in an icy parking lot, hitting her head on the ground. Citing the medical opinion of Dr. Blair, she further argues the neck injuries suffered in the two accidents led to her March 11, 2003, cervical fusion. Claimant seeks the costs associated with the treatment of her cervical condition including the fusion, time-loss benefits from the date of the fusion until she was declared medically stable on February 26, 2004, and the PPI rating of 28% of the whole person assigned her by Dr. Blair for the fusion. Citing the vocational opinion of Mr. Montague, she further argues, that as a consequence of her medical and non-medical factors, she is totally and permanently disabled, and that in the alternative, she is an odd-lot worker since any work search would be futile.

Defendants counter Claimant's cervical condition requiring the fusion was not the causal result of either the 2000 or 2001 industrial accidents. They cite the medical testimony of Dr. Knoebel and Dr. Weiss who both opined there was no objective evidence of trauma to Claimant's cervical spine after either accident, and that she had a pre-existing degenerative condition. They further cite Dr. Blair's acknowledgement that there was no objective evidence of a traumatic event to Claimant's cervical spine in any of the medical evidence he had seen. Citing the vocational opinion of Ms. Gentillon that Claimant had not lost any of her labor market access, Defendants

further argue Claimant has not shown her non-medical factors and PPI total 100%. They also argue she has failed to establish a *prima facie* case for odd-lot status since she has not attempted other types of employment without success, has not searched for other work and found it unavailable, and has not shown any work search would be futile. They then argue suitable work is regularly and continuously available to her, including returning to her prior position with Employer.

In rebuttal, Claimant argues Dr. Blair's testimony is credible, that she was not medically stable on July 21, 2001, as opined by Dr. Hill, since her neck symptoms had not resolved, and that the testimony of Defendants' IME witnesses is not credible. She further argues she has met her burden in proving total disability, and that any return to work with Employer is unreasonable.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Donna Butler, Employer's Executive Director, taken at the May 5, 2004, hearing;

2. Claimant's Exhibits A through E and G through X admitted at the hearing;

3. Defendants' Exhibits A through T admitted at the hearing;

4. The deposition of Benjamin Blair, M.D., with Exhibit 1, taken by Claimant on May 7, 2004;

5. The deposition of Terry L. Montague, with Exhibits 1 and 2, taken by Claimant on May 18, 2004;

6. The deposition of Richard T. Knoebel, M.D., with Exhibit A, taken by Defendants on May 19, 2004;

7. The deposition of Michael S. Weiss, M.D., taken by Defendants on May 27, 2004;

8. The deposition of Lori Gentillon, with Exhibit W, taken by Defendants on June 25, 2003; and,

9. The AMA *Guides to the Evaluation of Permanent Impairment*, Fifth Edition, (AMA *Guides*) of which the Referee takes notice.

Defendants' objection on p. 33 and Claimant's objection on p. 87 of Mr. Montague's deposition are sustained. Claimant's objection on p. 41 and Defendants' objection on p. 69 of Ms. Gentillon's deposition are also sustained.

After having fully considered all of the above evidence, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant grew up in Pocatello. She left high school in the twelfth grade to get married. After her first child was born, Claimant and her spouse moved to Blackfoot. She has lived there since. Over the succeeding years, Claimant worked as a waitress, on a processing line at a potato processing plant, and for a school district in the kitchen.

2. Claimant underwent bilateral decompressive partial and full laminectomies between L3 and L5 in October 1989 and April 1991. The pre- and post-operative diagnoses for both the initial surgery and the repeat surgery was spinal stenosis. The second surgery also removed bilateral synovial cysts. The surgeries were the consequence of a fall Claimant suffered while working as a bookkeeper for her spouse. They were performed at Bannock Regional Medical Center in Pocatello by D. Peter Reedy, M.D., a neurosurgeon.

3. Claimant had been referred to Dr. Reedy by Gail E. Fields, D.O., an orthopedic surgeon in Blackfoot. After being released by Dr. Reedy, Claimant returned to Dr. Fields.

According to Claimant, Dr. Reedy gave her a permanent lifting restriction of ten pounds which equates to sedentary work, restricted her from sitting for extended periods, and restricted her from working for more than five hours per day. Dr. Fields had previously given Claimant a permanent ten pound lifting restriction with no repetitive bending, and recommended she not work more than four hours per day. His restrictions were given between the two lumbar surgeries.

4. On November 13, 1991, Dr. Fields found that Claimant had reached maximum medical improvement, and assigned her a PPI rating of 25% of the whole person for her lumbar condition.

5. At the request of August E. Miller, M.D., her family physician, and Dr. Fields, Claimant saw Craig D. Scoville, M.D., Ph.D., on January 19, 1998, for an arthritis evaluation. Dr. Scoville, a rheumatologist, opined Claimant had bilateral inflammatory osteoarthritis of both hands with associated De Quervain's Syndrome, probable carpal tunnel syndrome (CTS), possible fibromyalgia syndrome, and a history of right foot pain most likely caused by low-grade osteoarthritis. He prescribed thumb and wrist splints, medications, and recommended she be evaluated by a physiatrist for her chronic low back pain.

6. As part of a vocational rehabilitation effort by the Idaho Division of Vocational Rehabilitation, Claimant entered a three month on-the-job training program run by Employer in Blackfoot on June, 17, 1999. At the time, she was considered a client, and had not worked since injuring her low back. Claimant successfully completed the program and was hired in September 1999 by Employer to work at its facility. She competed for the position. Employer provides vocational housing and social services to individuals with developmental and physical disabilities.

7. Claimant was hired as a developmentally disabled (DD) skills trainer working with

developmentally disabled individuals, training them in the skills of daily living. She was paid $6.12 per hour, and worked five hours per day, five days per week from 7:00 a.m. until 12:00 noon. The work was within Dr. Reedy's restrictions.

8. Claimant had begun receiving social security disability benefits after her second lumbar surgery. She consciously restricted the number of hours she worked for Employer in order to keep her benefits from being reduced.

9. Soon after she began working for Employer, Claimant became an unpaid volunteer worker with Special Olympics. In addition to various administrative tasks, she was in charge of local fundraising. Through the date of the hearing, Claimant continued to contribute two to three hours per day, 10 to 15 hours per week to the organization.

10. On November 15, 2000, Claimant was returning to Employer's facility after assisting three clients when a garbage truck failed to yield the right-of-way and broadsided the van she was driving. The force of the collision caused Claimant's head to be thrown into the driver's side window. The van belonged to Employer.

11. Claimant was taken to the Bingham Memorial Hospital (BMH) in Blackfoot complaining of neck and shoulder pain. She was seen by Andrew R. Bradbury, M.D., in the emergency room. After a CT scan of the entire spine, Dr. Bradbury diagnosed a neck strain and spinal stenosis. He prescribed medications, a cervical collar, restricted her activities, and referred her to Dr. Reedy.

12. Claimant saw Dr. Reedy on December 1, 2000. After reviewing x-rays, he opined Claimant had multiple levels of significant spondylotic degenerative disease at C4-5, C5-6, and C6-7, that her symptoms were primarily that of soft tissue injury, and that despite markedly degenerative

films, there were no neurologic problems. Dr. Reedy then referred her to Kevin S. Hill, M.D., a Pocatello physiatrist, for therapy.

13. After reviewing the November 2000 CT scan, Dr. Hill opined Claimant had suffered a flexion/extension injury of her cervical spine with posterior occipital and mid-trapezius myofascial pain, that she had cervical degenerative disease secondary to osteoarthritis, and that she had a history of polio as a child. He further noted Claimant's childhood polio had affected her lower extremities and that she did not start to walk until she was six. Dr. Hill prescribed medications and physical therapy.

14. Claimant continued to treat with Dr. Hill through at least January 2001 when he noted her pain was significantly reduced and that she was participating in more activities. He gave her at least one trigger point injection in the left trapezius.

15. Claimant returned to work with Employer several weeks after her November 15, 2000, industrial accident. Surety paid related medical and time-loss benefits.

16. On February 22, 2001, after loading a blind client into Employer's van, Claimant slipped and fell, striking her head on the ground. She was taking the client to Pocatello for an evaluation; the parking lot was icy. As a consequence of the fall, Claimant lost consciousness. She regained consciousness in Employer's facility attended to by a co-worker. She has no memory of the incident. No one witnessed the fall. The co-worker took Claimant to Dr. Miller's office where he noted she was complaining of a diffuse headache and acute dizziness.

17. Dr. Miller sent Claimant to BMH for a CT head scan; it was normal. Claimant returned to work with Employer several days later. There is no indication in the record Dr. Miller imposed any restrictions on her as a consequence of the fall. Surety paid medical and time-loss

benefits.

18. Claimant returned to Dr. Hill on March 6, 2001. He noted her neck was slightly stiff, that she had recently fallen and suffered a concussion, but that her cervical condition was significantly improved. Dr. Hill recommended Claimant continue with her stretching exercises; he further indicated he would see her back as necessary. This was the last time she saw Dr. Hill.

19. In a July 31, 2001, letter to Surety, Dr. Hill indicated he released Claimant on March 6, 2001, with instructions to continue her stretching program. He further indicated she was now stable.

20. At Dr. Miller's request, Claimant saw Hugh S. Selznick, M.D., for left foot pain on September 19, 2001. X-rays showed a bone spur on the heel. Dr. Selznick, a Pocatello orthopedic surgeon, opined Claimant suffered from either heel spur syndrome or plantar fasciitis, and recommended conservative care.

21. In a note dated December 11, 2001, Dr. Fields opined Claimant could not work more than five hours per day due to degenerative changes in her feet and back. He also noted she had a bone spur on the bottom of her foot.

22. In February 2002 Claimant moved from her position as a DD skills trainer to being a relief residential supervisor at a co-located residential care facility run by Employer. The goal of the residential facility was to return clients to independent living. Thirteen of Employer's clients lived at the facility. Claimant had approached Employer and expressed an interest in making the move. The move also meant the amount of time she spent transporting clients would be significantly reduced. Her pay increased to $6.50 per hour.

23. Immediately prior to the move, Claimant saw Dr. Miller. At her request, he

eliminated the five hour work day restriction. The new position Claimant was seeking would require her to work more than five hours per day if she had to fill-in for residential supervisors. Most of the time, however, she filled-in during the day when the housing coordinator was attending to responsibilities outside the residential facility. This generally amounted to five hours of work per day, Claimant's old schedule. On occasion she would fill-in for the day residential supervisor from 8:00 a.m. until 5:00 p.m. The ten pound lifting restriction remained in place.

24. On May 20, 2002, Dr. Selznick noted Claimant's left heel spur syndrome was resolving, and that she clinically demonstrated right CTS. Right arm NCS/EMG studies confirmed mild CTS. Claimant elected to proceed with a surgical release.

25. On June 27, 2002, Dr. Selznick performed a right carpal tunnel release and flexor tenosynovectomy on Claimant. He noted a history of ongoing right hand pain and progressive numbness in Claimant's thumb, index, and middle fingers. On July 10, 2002, Dr. Selznick noted Claimant was doing very well on the right, but that she had increasing CTS on the left. On September 5, 2002, he performed a left carpal tunnel release and flexor tenosynovectomy. On September 18, 2002, he noted Claimant was doing very well on the left. The procedures were performed at Rocky Mountain Surgery Center in Pocatello.

26. There is nothing in the record to indicate Claimant's bilateral CTS was work related, and no argument to that effect has been made.

27. Claimant returned to Dr. Selznick on November 6, 2002, complaining of left ankle pain. He described the problem as chronic, and opined it was mostly a posterior tibialis tendon problem. Dr. Selznick recommended conservative care. He did not feel the problem was related to her childhood polio.

28. Claimant voluntarily left employment with Employer on November 15, 2002. The night residential supervisor was transferred and Employer asked Claimant to fill that individual's position on a temporary basis until a new employee could be hired and trained. The temporary assignment required Claimant to be at the facility from 5:00 p.m. until 8:00 a.m. She would be allowed to sleep from 10:00 p.m. until 5:00 a.m. in a designated room. Claimant would not be paid while sleeping.

29. Both parties offered differing opinions on how the request to assume the temporary assignment was made to Claimant. The outcome was that she refused to take the assignment and left. She claimed it was over the pay issue. Claimant had, however, performed the job in the past as a fill-in. Employer stated the position was filled and the incumbent working four days later.

30. Claimant had received excellent evaluations from Employer. There were no concerns about any aspect of her job performance.

31. Claimant was awarded unemployment insurance benefits after she left Employer. The benefits were stopped after Job Service indicated work was available to her and Claimant decided not to return to work. She maintains she could not work due to her medical condition. The job was with Employer.

32. A head CT scan taken on December 11, 2002, was normal and showed no changes from a similar scan performed on February 22, 2001, after Claimant's parking lot fall. Claimant had been complaining of increasing headaches.

33. At Dr. Selznick's request, Claimant saw Benjamin Blair, M.D., on December 23, 2002. Both are orthopedic surgeons in the same clinic with different specialties; Dr. Blair specializes in the spine. Claimant related a history of progressively worsening neck pain and

occipital headaches since her slip and fall. X-rays of the cervical spine were taken. Dr. Blair diagnosed cervical spondylosis and probable associated stenosis. He prescribed medications and physical therapy. The conservative care did not help. Dr. Blair then ordered a MRI. It showed spondylosis and associated stenosis from C4 through C7. He recommended surgical intervention; Claimant agreed.

34. On March 11, 2003, Dr. Blair performed a four level anterior diskectomy and interbody fusion with anterior cervical plate and allograft strut from C3 to C7 at Portneuf Medical Center in Pocatello. The pre-operative physical noted Claimant had a long history of ongoing neck pain with insidious onset progressively worsening.

35. In a letter dated March 31, 2003, Dr. Blair opined Claimant exacerbated her underlying cervical spondylosis and stenosis in the February 22, 2001, industrial accident, and that the March 11, 2003, surgical procedures were causally related to the aggravation she sustained in the accident. His opinions were to a reasonable degree of medical probability.

36. At Surety's request, Michael S. Weiss, M.D., a Boise physiatrist, performed a record review on April 9, 2003. Dr. Blair would not allow Claimant to travel to Boise for an IME that close to her surgery. Dr. Weiss concluded Claimant apparently made adequate improvement in physical therapy after her MVA, that her slip and fall apparently produced a setback in her pain symptoms, but that she improved to the point Dr. Hill found her stable and encouraged her to continue with a stretching program. He further opined the treatment recommended by Dr. Blair appeared to be related to Claimant's underlying and pre-existing degenerative condition and was not related to either of her accidents. Dr. Weiss also opined Claimant had no PPI related to either injury since there had been no significant change after either injury and her chronic pain pre-existed both

injuries. He imposed work restrictions equating to light work.

37. Based on Dr. Weiss' record review, Surety terminated Claimant's benefits.

38. On April 28, 2003, Dr. Blair noted Claimant was doing very well post-operatively. He prescribed physical therapy. On June 12, 2003, Dr. Blair indicated he was unsure if anything remained to be done with Claimant other than observation.

39. In a February 26, 2004, letter, Dr. Blair opined Claimant was fixed and stable, that under the AMA *Guides*, she had a 28% of the whole person PPI rating, and that the PPI rating was solely attributable to the November 15, 2003 [sic] and February 22, 2001, injuries. In his examination that day, Dr. Blair noted Claimant's fusion showed good progression, that her symptomatology was essentially unchanged, and that continued conservative care was warranted.

40. At Surety's request, Claimant saw Richard T. Knoebel, M.D., on April 21, 2004, for an IME. Dr. Knoebel opined Claimant's two industrial accidents temporarily aggravated her significant, pre-existing and symptomatic neck and back degenerative joint disease, and that her condition reasonably returned to baseline in March 2001. He further opined medical and time-loss benefits were not indicated on an industrial basis after March 2001, that there was no industrially-related PPI, and that Claimant could return to work on an industrial basis. Dr. Knoebel also opined the 28% of the whole person PPI assigned Claimant by Dr. Blair was reasonable.

41. Surety retained Lori Gentillon, a vocational evaluator, to review medical and physical therapy records relating to Claimant, and her deposition, and to offer an opinion on her employability. In her report, dated April 21, 2004, Ms. Gentillon opined, considering Claimant's current job market, she had not lost her opportunity to work due to her injury, and that if she had not resigned her position with Employer, she would have maintained her employment. She further

opined Claimant's work experience and desire to work with individuals with disabilities was marketable and valued by several employers in the area, that her willingness to work part-time enhanced her employability since many of the positions she could fill were part-time, and that there were currently at least three job openings listed with the local Job Service office she could fill and that paid wages comparable to what she earned with Employer.

42. On her own initiative, Claimant underwent a FCE with Sharik L. Peck, RPT, of ErgoHELP in Pocatello on April 27-28, 2004. The evaluation listed Claimant's restrictions while working an eight hour day and 40 hour week, but offered no recommendations. The primary limitations observed were caused by general body weaknesses, limited ROM, and excessive body habitus.

43. At Claimant's request, Terry L. Montague, a vocational rehabilitation consultant, performed a case assessment and vocational evaluation. His report is dated May 13, 2004, but contains essentially the same opinions as a preliminary report dated May 4, 2004. Mr. Montague opined there were no occupations available to Claimant in the open market for which she could compete, and that it would be futile for her to look for work given her permanent work restrictions. He further opined, that due to her age, lack of education, and inability to return to any of her pre-injury occupations, Claimant was totally and permanently disabled.

44. Claimant has neither worked nor applied for work since leaving Employer.

45. At the time of the hearing, Claimant was 62 years old. She is a CNA with additional training in first aid, CPR, and defibrillators. She has also received training from Employer in dealing with handicapped individuals.

46. At hearing, Employer stated the physical restrictions identified in the FCE would not

preclude Claimant from returning to work as either a skills trainer or relief residential supervisor, and that she would be welcomed back as an employee.

47. At his post-hearing deposition, Dr. Blair indicated he had been treating Claimant since December 23, 2002, for cervical stenosis, and that he continued to treat her. He opined the traumatic nature of Claimant's November 15, 2000, and February 22, 2001, industrial accidents combined to aggravate or exacerbate her pre-existing asymptomatic cervical spondylosis and stenosis, causing it to become symptomatic, and necessitating her cervical fusion. Dr. Blair further opined the vast majority of exacerbations last four to six weeks, but that Claimant's did not; she remained symptomatic long enough to justify surgery. He also opined, based on the AMA *Guides*, Claimant had a 28% of the whole person PPI for a cervical fusion. Dr. Blair opined he would have restricted her from working for six weeks after her fusion, and then for another six weeks before she could work up to 25 hours per week and lift ten pounds. He further opined Claimant could drive up to four hours per day provided she rest for five minutes every one-half hour. Dr. Blair acknowledged that there was no objective evidence of a traumatic event to Claimant's cervical spine in any of the medical evidence he had seen.

48. At his post-hearing deposition, Dr. Knoebel opined Claimant demonstrated some pain amplification and restricted her movements during his examination of her. He further opined the November 15, 2000, CT scan of Claimant's cervical spine showed longstanding, severe degenerative changes with no evidence of an acute injury, and that the January 21, 2003, MRI scan of her cervical spine showed a natural progression of degenerative changes over a three year period. Dr. Knoebel also opined Claimant only incurred temporary soft tissue injuries in her two industrial accidents which subsequently returned to baseline. He opined the need for Claimant's cervical fusion was

consistent with pre-existing and non-industrial changes. Dr. Knoebel also acknowledged Dr. Scoville did not specifically reference any neck or cervical spine symptomology after examining Claimant on January 19, 1998, which calls into question his prior opinion Claimant's neck condition was symptomatic prior to the two industrial accidents.

49. At his post-hearing deposition, Dr. Weiss indicated he agreed with Dr. Blair's diagnosis and treatment of Claimant. He opined the November 15, 2000, CT scan of Claimant's cervical spine did not show any evidence of an acute abnormality, and that the January 21, 2003, MRI scan of her cervical spine showed findings characteristic of a progressive degenerative condition rather than a trauma. Dr. Weiss further opined he did not see anything in the medical records which suggested the November 2000 or February 2001 industrial accidents caused a change which altered the progression of Claimant's degenerative cervical condition. He also opined Claimant's cervical fusion was related to the progression of her spinal arthritis which produced stenosis at multiple levels, flattening her spinal cord, and causing weakness in her arms, all of which was related to a diagnosis established prior to her two industrial accidents. Dr. Weiss opined the two accidents kicked the arthritis into high gear, and that Claimant ended up having the fusion sooner than she would have ultimately had to have. He indicated arthritis of the spine referred to the whole spine, that arthritis is an inflammation of a joint, and that unless there is something objective, the natural progression of the disease is not changed.

50. The opinions of Dr. Blair, Dr. Knoebel, and Dr. Weiss were all to a reasonable degree of medical probability.

51. At his post-hearing deposition, Mr. Montague opined that without some superhuman effort on Claimant's part, or temporary good luck, or a sympathetic employer, the likelihood of her

being employed in the general labor market was not going to happen. He acknowledged not performing a transferable skills analysis or a labor market analysis, and that he had not contacted any employer on Claimant's behalf. Mr. Montague indicated his opinion was based on Claimant's condition after her cervical fusion and the FCE.

52. At her post-hearing deposition, Ms. Gentillon opined Claimant, after successfully completing her on-the-job training with Employer, would be considered a semi-skilled worker, a paraprofessional, with marketable skills, and that her labor market had expanded to include social service aide and personal home care attendant. She further opined the results of the FCE would not preclude Claimant from performing the duties of either job she held with Employer. Ms. Gentillon stated she did a limited job search and found three to four DD skills trainer positions open with Employer in Blackfoot and one with her own organization [Development Workshop] in Idaho Falls with the possibility of three more by August 2004. She then opined Claimant had not lost access to her labor market, and that suitable work was regularly and continuously available to her in an open competitive labor market. Ms. Gentillon cited positions described as developmental therapy aide, job coach, therapy aide, home care provider, personal and home care aide, shelter home aide, social service aide, caregiver, foster grandparent, and teacher assistant as similar to Claimant's work for Employer and positions within her specific labor market.

53. Both Mr. Montague and Ms. Gentillon opined Claimant's labor market stretched from Idaho Falls to Pocatello.

DISCUSSION

The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 793 P.2d 187 (1990). The

humane purposes which it serves leaves no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996).

1. **Injury (Causation)/Pre-existing Condition.** The Idaho Workers' Compensation Law defines injury as a personal injury caused by an accident arising out of and in the course of employment. An accident is defined as an unexpected, undesigned, and unlooked for mishap, or untoward event, connected with the industry in which it occurs, and which can be reasonably located as to time when and place where it occurred, causing an injury. An injury is construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. Idaho Code § 72-102 (17).

A claimant must prove not only that he or she was injured, but also that the injury was the result of an accident arising out of and in the course of employment. *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 751, 918 P.2d 1192, 1196 (1996). Proof of a possible causal link is not sufficient to satisfy this burden. *Beardsley v. Idaho Forest Industries*, 127 Idaho 404, 406, 901 P.2d 511, 513 (1995). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." *Fisher v. Bunker Hill Company*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. *See*, *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001). The Idaho Supreme Court has long held that an employee may be compensated for the aggravation or acceleration of his/her pre-existing condition, but only if such aggravation results from an

industrial accident as defined by Idaho Code § 72-102 (17). *Nelson v. Ponsness-Warren Idgas Enterprises*, 126 Idaho 129, 132, 879 P.2d 592, 595 (1994).

The medical record reflects Claimant suffered from pre-existing cervical spondylosis and stenosis. The record also reflects she was injured in a MVA on November 15, 2000, and in a slip and fall on February 22, 2001. Both accidents were work related and involved trauma to Claimant's neck. While she saw numerous physicians for a variety of conditions prior to the industrial accidents, there is no indication in the records provided the Commission she sought care for any neck condition. Claimant testified her neck did not begin to hurt until she injured it in the two accidents.

Dr. Blair opined the traumatic nature of Claimant's two industrial accidents combined to aggravate or exacerbate her pre-existing asymptomatic cervical spondylosis and stenosis, causing it to become symptomatic, and necessitating her cervical fusion. In his IME report, Dr. Knoebel opined the two accidents temporarily aggravated Claimant's significant and pre-existing neck degenerative disease. At his deposition, he opined Claimant only incurred temporary soft tissue injures which subsequently returned to baseline. At his deposition, Dr. Weiss indicated he did not see any evidence of an acute abnormality on Claimant's films or any evidence in her medical records which would suggest the two accidents caused a change which in turn altered the progression of Claimant's degenerative condition. Dr. Knoebel also advanced a similar theory. The statute, however, only requires violence to the physical structure of the body which occurred here in both accidents. Moreover, Dr. Weiss agreed with Dr. Blair's diagnosis and treatment, and also opined the two accidents kicked Claimant's arthritis into high gear, and that she ended up having the fusion sooner than she would have ultimately had to have. The Referee finds Claimant has carried her

burden and further concludes she aggravated her pre-existing cervical spondylosis and stenosis in the November 15, 2000, and February 22, 2001, industrial accidents. In so finding, the Referee notes the opinions that the soft tissue injuries to Claimant's neck resolved or returned to baseline, do not also mean her cervical degenerative condition also returned to baseline; the films indicate it continued to progress.

2. **Medical Benefits.** The employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. Idaho Code § 72-432 (1). The Idaho Supreme Court has held that for the purposes of Idaho Code § 72-432 (1), medical treatment is reasonable if the employee's physician requires the treatment and it is for the physician to decide whether the treatment is required. *Mulder v. Liberty Northwest Insurance Company*, 135 Idaho 52, 58, 14 P.3d 372, 402, 408 (2000).

Having previously concluded Claimant aggravated her pre-existing cervical spondylosis and stenosis in the November 15, 2000, and February 22, 2001, industrial accidents, the Referee further concludes she is entitled to the medical care required by Dr. Blair to treat her cervical condition including the March 11, 2003, fusion, and the post-surgical physical therapy.

3. **Average Weekly Wage.** Claimant worked 25 hours per week and was being paid $6.12 per hour at both the time of her November 15, 2000, industrial accident, and her February 22, 2001, industrial accident. Thus, the Referee concludes her average weekly wage is $153.00.

4. **Temporary Disability Benefits.** Idaho Code § 72-102 (10) defines "disability," for

the purpose of determining total or partial temporary disability income benefits, as a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided for in Idaho Code § 72-430. Idaho Code § 72-408 further provides that income benefits for total and partial disability shall be paid to disabled employees "during the period of recovery." The burden is on a claimant to present expert medical opinion evidence of the extent and duration of the disability in order to recover income benefits for such disability. *Sykes v. C. P. Clare and Company*, 100 Idaho 761, 605 P.2d 939 (1980). Once a claimant establishes by medical evidence that he or she is still within the period of recovery from the original industrial accident, he or she is entitled to temporary disability benefits unless and until such evidence is presented that he or she has been released for light duty work *and* that (1) his or her former employer has made a reasonable and legitimate offer of employment to him or her which he or she is capable of performing under the terms of his or her light work release and which employment is likely to continue throughout his or her period of recovery *or* that (2) there is employment available in the general labor market which claimant has a reasonable opportunity of securing and which employment is consistent with the terms of his or her light duty work release. *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986) (emphasis in original).

Dr. Blair opined he would have completely restricted Claimant from working for six weeks after her March 11, 2003, cervical fusion, and then for another six weeks before she could work up to 25 hours per week and lift ten pounds. He imposed no other work restrictions. These restrictions equate to the restrictions Claimant worked under prior to her 2000 and 2001 industrial injuries. Although Claimant left Employer prior to her cervical surgery, work was available to her in her

labor market consistent with her work restrictions when she was released by Dr. Blair. This availability is demonstrated by the opinion of Ms. Gentillon which the Referee finds persuasive. The Referee finds Claimant was actually and totally disabled from work during her period of recovery from her cervical fusion, *i.e.*, the period Dr. Blair restricted her from working. Thus, the Referee concludes she is entitled to temporary total disability (TTD) benefits from March 11, 2003, until June 3, 2003.

5. **Impairment.** "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or non progressive at the time of evaluation. Idaho Code § 72-422. "Evaluation (rating) of permanent impairment" is a medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living, such as self-care, communication, normal living postures, ambulation, elevation, traveling, and nonspecialized activities of bodily members. Idaho Code § 72-424. When determining impairment, the opinions of physicians are advisory only. The Commission is the ultimate evaluator of impairment. *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989).

Dr. Blair assigned Claimant a 28% of the whole person PPI rating, and Dr. Knoebel agreed it was reasonable. The rating is apparently taken from Table 15-5 of the AMA *Guides* and represents the upper limit of DRE Cervical Category IV. The Referee finds this rating appropriate since the criteria for this particular rating category has been met: there was an alteration of the motion segment integrity due to a fusion. Thus, the Referee concludes Claimant is entitled to a permanent partial impairment (PPI) rating of 28% of the whole person.

6. **Permanent Disability**. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant, provided that permanent partial or total loss or loss of use of a member or organ of the body no additional benefits shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

There are two methods by which a claimant can demonstrate he or she is totally and permanently disabled. First, a claimant may prove a total and permanent disability if his or her medical impairment together with the pertinent nonmedical factors totals 100%. If the claimant has met this burden, then total and permanent disability has been established. If, however, the claimant has proven something less than 100% disability, he or she can still demonstrate total disability by fitting within the definition of an odd-lot worker. *Boley v. State, Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). Here, Claimant argues she is totally and permanently disabled under either method. The odd-lot doctrine, however, only comes into play once a claimant has proven something less than 100% disability. *E.g.*, *Hegel v. Kuhlman Brothers, Inc.*, 115 Idaho 855, 857, 771 P.2d 519, 521 (1989).

The record reflects Claimant has been awarded a PPI rating of 25% of the whole person for her lumbar spine, and a 28% of the whole person PPI rating for her cervical spine. She has also been given permanent work restrictions precluding her from lifting over ten pounds, which equates to sedentary work, and from working over five hours per day. These restrictions have been in place, except for a short period of time when the hours worked per day was raised at Claimant's request, since her two lumbar surgeries.

Mr. Montague opined there were no occupations available to Claimant in the open market for which she could compete, and that it would be futile for her to look for work given her permanent work restrictions. He further opined, that due to her age, lack of education, and inability to return to any of her pre-injury occupations, Claimant was totally and permanently disabled. Claimant, however, successfully competed for employment with these same work restrictions, and successfully worked as a DD skills trainer with Employer. Her age and lack of a high school education did not

work against her; her maturity may have helped her. Claimant enjoyed her work and Employer considered her an excellent employee. Moreover, she continues to work for Special Olympics ten to fifteen hours per week. Mr. Montague's opinion has little persuasive value.

Ms. Gentillon opined Claimant, after successfully completing her on-the-job training with Employer, would be considered a semi-skilled worker, a paraprofessional, with marketable skills, and that her labor market had expanded to include social service aide and personal home care attendant. She further opined Claimant's work experience and desire to work with individuals with disabilities was marketable and valued by several employers in the area, that her willingness to work part-time enhanced her employability since many of the positions she could fill were part-time. Ms. Gentillon also opined the results of the FCE would not preclude Claimant from performing the duties of either job she held with Employer. Ms. Gentillon stated she did a limited job search and found three to four DD skills trainer positions open with Employer in Blackfoot and one with her own organization [Development Workshop] in Idaho Falls with the possibility of three more by August 2004. She then opined Claimant had not lost access to her labor market, and that suitable work was regularly and continuously available to her in an open competitive labor market that paid wages comparable to what she earned with Employer. The Referee finds the opinions of Ms. Gentillon, who is familiar with the types of jobs Claimant can compete for, and with her labor market, persuasive in this matter.

Based on Claimant's total impairment rating of 53% of the whole person and her permanent work restrictions, and considering her non-medical factors, including her age, education, transferable skills, and personal situation, the Referee finds Claimant's ability to engage in gainful activity has not been reduced. Thus, the Referee concludes Claimant is entitled to a permanent total disability of

53% of the whole person inclusive of her permanent impairment.

Claimant can also demonstrate total disability by fitting within the definition of an odd-lot worker. An odd-lot worker is one "so injured that he [or she] can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996). Such workers are not regularly employable "in any well-known branch of the labor market - absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984). The burden of establishing odd-lot status lies with the claimant who must prove the unavailability of suitable work. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 153, 795 P.2d 312, 315 (1990).

A claimant may satisfy his or her burden of proof and establish odd-lot disability status in one of three ways:

1. By showing that he or she has attempted other types of employment without success;
2. By showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other work and other work is not available; or
3. By showing that any efforts to find suitable work would be futile.

Lethrud v. Industrial Special Indemnity Fund, 126 Idaho 560, 563, 887 P.2d 1067, 1070 (1995).

The record reflects Claimant has not attempted other types of employment without success and that she has not had vocational counselors or employment agencies search for employment on her behalf without success. The Referee finds she has failed to establish odd-lot status under either

the first or second prong of the *Lethrud* test.

Claimant, relying on the opinion of Mr. Montague, argues any work search would be futile. Ms. Gentillon argues to the contrary. The Referee finds Claimant has also not shown that any efforts to find suitable work would be futile. Mr. Montague's general opinion is unpersuasive when compared to the more specific one of Ms. Gentillon. Therefore, the Referee further finds Claimant has also not satisfied her burden of proof and established odd-lot status under the third prong of the *Lethrud* test. Thus, the Referee concludes Claimant is not totally and permanently disabled under the "odd-lot" doctrine.

7. **Apportionment.** Idaho Code § 72-406 (1) provides that in cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a pre-existing physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease. The Idaho Supreme Court has held that under Idaho Code § 72-406, employers do not become liable for all of the disability resulting from the combined causes of a pre-existing injury and/or infirmity and the work-related injury, but only for that portion of the disability attributable to the work-related injury. *Horton v. Garrett Freightlines, Inc.*, 115 Idaho 912, 929, 772 P.2d 119, 136 (1989). The Court further held that any apportionment under Idaho Code § 72-406 must be explained with sufficient rationale to enable it to review whether the apportionment is supported by substantial and competent evidence. *Reiher v. American Fine Foods*, 126 Idaho 58, 62, 878 P.2d 757, 761 (1994).

The record reflects Claimant has a permanent disability rating less than total, and a pre-existing permanent impairment rating of 25% for her lumbar condition. After her cervical fusion,

she was given an additional impairment rating of 28%. Claimant's permanent disability, however, does not exceed the total of her two impairment ratings. Thus, the Referee concludes apportionment under the statute is not appropriate.

8. **Attorney's Fees.** The issue of attorney's fees was raised by Claimant, but not argued. The Referee concludes the issue has been withdrawn. Moreover, under the circumstances, Defendants' conduct in this matter has not been unreasonable.

CONCLUSIONS OF LAW

1. Claimant aggravated her pre-existing cervical spondylosis and stenosis in the November 15, 2000, and February 22, 2001, industrial accidents.

2. Claimant is entitled to the medical care required by Dr. Blair to treat her cervical condition including the March 11, 2003, fusion, and the post-surgical physical therapy.

3. Claimant's average weekly wage is $153.00 .

4. Claimant is entitled to temporary total disability (TTD) benefits from March 11, 2003, until June 3, 2003.

5. Claimant is entitled to a permanent partial impairment (PPI) rating of 28% of the whole person.

6. Claimant is entitled to a permanent total disability of 53% of the whole person inclusive of her permanent impairment.

7. Claimant is not totally and permanently disabled under the "odd-lot" doctrine.

8. Apportionment under Idaho Code § 72-406 is not appropriate.

9. The issue of whether Claimant is entitled to attorney's fees under Idaho Code § 72-804 has been withdrawn.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends the Commission adopt such findings and conclusions as its own, and issue an appropriate final order.

DATED In Boise, Idaho, this 29th day of November, 2004.

INDUSTRIAL COMMISSION

/s/_____
Robert D. Barclay
Chief Referee

ATTEST:

/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __9th__ day of ___December___, 2004, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

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kkr /s/_____